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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ERIC LEWIS DAVIS, Defendant and Appellant.	D073554 (Super. Ct. No. SCD273996)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L Garland, Assistant Attorney General, A. Natasha Cortina and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

Yelling, "You're going to die," Eric Lewis Davis chased John M. with a seven-inch knife and got an arm's length away from stabbing him. A jury convicted Davis of

assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1); count 1) and making a criminal threat (§ 422; count 2). The jury also found that Davis personally used a dangerous and deadly weapon. Subsequently, the court found that Davis had two prison priors and sentenced him to four years in prison.

On appeal, Davis contends his convictions should be reversed because the trial court (1) failed to sua sponte instruct on simple assault as a lesser included offense of aggravated assault, and (2) gave erroneous jury instructions defining "deadly weapon." The Attorney General concedes that the court erroneously defined "deadly weapon," but asserts that error was harmless.

We affirm. The court had no obligation to instruct on simple assault because the evidence established that if Davis was guilty at all, it was for aggravated assault. Moreover, the instructional error was harmless beyond a reasonable doubt under this court's recent decision in *People v. Stutelberg* (2018) 29 Cal.App.5th 314 (*Stutelberg*).

FACTUAL BACKGROUND

A. *The People's Case*

John M. was waiting for a bus in downtown San Diego. He was carrying his skateboard (about 40 inches long) and had some expensive plants that he was delivering.

Davis walked by the bus stop and swatted at John's plants. John, who did not know Davis, told him that the plants "are like my kids. Don't touch my kids."

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1 Undesignated statutory references are to the Penal Code.

After walking about a half-block away, Davis returned, carrying a knife with a seven-inch blade and said to John, "You're going to die now." John retreated into the street, but Davis chased him aggressively with the knife. John used his skateboard as a shield, jabbing it at Davis to keep him away. After a few minutes, police arrived and arrested Davis.

Two witnesses corroborated John's testimony. Jessica D. saw Davis pull the knife from his waistband and testified that Davis, who was acting "aggressively," got within six inches to one foot of John. Jason S., an on-duty security officer, testified that Davis was stabbing at John and got within an arm's length away.

B. *Defense Case*

Davis testified that he stopped to look at John's plants because he is a "landscape architecture [*sic*]." John told him to "get the fuck away from his plant." Davis thought he recognized John as a family friend and extended his hand to shake hands.

Davis testified that John responded by assuming a fighting stance. After the two exchanged harsh words, John poked Davis in the chest with his skateboard and then hit Davis in the lip with the skateboard.

Davis was wearing a backpack that contained tent poles, some food, and a knife. Davis testified that the knife fell out of the backpack when John was attacking him. Davis testified that he retrieved the knife off the ground and immediately returned it to

his backpack. He testified that the knife was in his hands only for the "second or two" it took to put it back in his backpack.[2]

DISCUSSION

I. *THE COURT DID NOT ERR BY FAILING TO INSTRUCT ON SIMPLE ASSAULT AS A LESSER INCLUDED OFFENSE*

Simple assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Davis contends that the trial court had a sua sponte duty to instruct on simple assault as a lesser included offense of assault with a deadly weapon.

However, a trial court must instruct on a lesser included offense only if there is substantial evidence that the defendant is guilty only of the lesser. (*People v. Prince* (2007) 40 Cal.4th 1179, 1265.) The court has no such obligation "when there is no evidence that the offense is less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154, superseded on another ground by amendment of § 189 not relevant here.)

Here, the court instructed with CALCRIM No. 875 on assault with a deadly weapon or force likely to produce great bodily injury as follows:

> "The defendant is charged in Count 1 with assault with a deadly weapon other than a firearm in violation of Penal Code section 245.
>
> "To prove that the defendant is guilty of this crime, the People must prove that:

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2 On cross-examination, Davis was impeached with four prior felony convictions.

"1. The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person;

"2. The defendant did that act willfully;

"3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

"4. When the defendant acted, he had the present ability to apply force with a deadly weapon other than a firearm;

"AND

"5. The defendant did not act in self-defense.

"Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"The People are not required to prove that the defendant actually touched someone.

"The People are not required to prove that the defendant actually intended to use force against someone when he acted.

"No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault.

"A *deadly weapon other than a firearm* is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

"*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."

The court had no obligation to instruct on simple assault because the evidence established that if Davis was guilty at all, it was for aggravated assault and not a lesser

crime. Davis denied committing any crime; he testified that John assaulted *him*. In closing argument, Davis's attorney argued that John "was the one who got physical, and [John] is the one who assaulted [Davis], not the other way around." Accordingly, if the jury believed Davis's testimony, it could not have convicted him of simple assault because the jury would have believed that he did not do an act that by its nature would directly and probably result in the application of force to John. "Generally, when a defendant completely denies complicity in the charged crime, there is no error in failing to instruct on a lesser included offense." (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709.) Davis provides no reason why we should ignore this rule here.

Disagreeing with this result, Davis contends his testimony that the knife fell out of his backpack "is substantial evidence from which the jury could have concluded that he committed assault . . . ." This argument fails because an assault occurs when a person willfully commits an act that by its nature would probably and directly result in the application of force on another person, and the person committing that act is aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act, physical force would be applied to another person. (*People v. Navarro* (2013) 212 Cal.App.4th 1336, 1345-1346.) Picking a knife up off the ground and immediately placing the knife in a backpack is not assault because these acts would not probably and directly result in the application of force to another person.

II. *THE INSTRUCTIONAL ERROR IS HARMLESS*

To convict Davis of assault with a deadly weapon and to make true findings on the deadly weapon enhancements, the jury had to determine whether the knife Davis used

was a deadly weapon. The court instructed the jury with CALCRIM No. 875, which defines "deadly weapon" as follows:

> "A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

On the enhancements, the court instructed with CALCRIM No. 3145, which similarly defines a deadly weapon, stating:

> "A deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

Colloquially, a kitchen knife with a seven-inch blade might reasonably be considered to be an "inherently" deadly weapon. However, the legal definition is more nuanced. Whether an object is an inherently deadly weapon "is a term of art describing objects that are deadly or dangerous in "'the ordinary use for which they are designed,'" that is, weapons that have no practical nondeadly purpose." (*Stutelberg*, *supra*, 29 Cal.App.5th at pp. 318-319.) Thus, dirks and blackjacks are inherently deadly weapons because their ordinary purpose is to injure people; they are "deadly per se." (*People v. Brown* (2012) 210 Cal.App.4th 1, 6 (*Brown*).)

"Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.)

The ordinary purpose of a kitchen knife is to cut food, not harm people. Accordingly, an ordinary kitchen knife such as the one involved in this case is not an inherently deadly weapon because it is not dangerous to others in the use for which it is designed. (*People v. McCoy* (1944) 25 Cal.2d 177, 188.)

However, a kitchen knife, while not inherently deadly, may be a deadly weapon within the meaning of section 245, subdivision (a)(1) when *used* in a manner capable of causing and likely to cause death or great bodily injury. (*Brown, supra,* 210 Cal.App.4th at p. 7.) Thus, for the jury to properly find that Davis used a deadly weapon, it would have needed to solely rely on the second definition in CALCRIM Nos. 875 and 3145—that Davis *used* the knife in a way capable of causing and likely to cause death or great bodily injury.

Davis contends the court erred by telling the jury there were two alternate theories for finding him guilty of assault with a deadly weapon and for finding the personal use enhancement true. One theory was legally correct—that the knife was used in such a way that it was capable of causing and likely to cause death or great bodily injury. However, Davis asserts that the other theory—that the knife was inherently deadly—was legally incorrect.

On this narrow point, the Attorney General concedes that the knife Davis used is not an inherently dangerous weapon and, therefore, the trial court erred in instructing the jury that it could convict him of assault with a deadly weapon and find the deadly weapon enhancements to be true on a theory that the knife was inherently deadly.

The parties, however, disagree on whether the error requires reversal. Citing *People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105 (*Aledamat*), Davis contends the judgment must be reversed because it is impossible to establish on this record that the jury actually relied on the legally correct theory.[3]

In *Aledamat*, *supra*, 20 Cal.App.5th 1149, the defendant was charged with assault with a deadly weapon after he threatened to kill the victim with the exposed blade of a box cutter. The trial court instructed on the definition of a deadly weapon using CALCRIM No. 875. (at pp. 1152-1153.) The jury found the defendant guilty as charged and found true the deadly weapon allegation. (*Id*. at p. 1152.) On appeal, Division Two of the Second District reversed the assault conviction and the deadly weapon enhancement, holding that the trial court erred by instructing the jury that it could find the box cutter to be inherently deadly. (*Id.* at pp. 1151, 1153, 1155.) In determining whether that error was prejudicial, the *Aledamat* court held that absent proof that the jury "has 'actually' relied upon the valid theory [citations], . . . the conviction must be overturned—even if the evidence supporting the valid theory was overwhelming." (*Id.* at p. 1153, italics omitted.)

The Attorney General contends that *Aledamat*, *supra*, 20 Cal.App.5th 1149 was wrongly decided and should not be followed. The more apt case, the Attorney General asserts, is *Brown*, *supra*, 210 Cal.App.4th 1, which involved a BB gun—a weapon that,

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3 The California Supreme Court granted review in *Aledamat* to address the appropriate standard for evaluating prejudice resulting from legal error. (*Stutelberg*, *supra*, 29 Cal.App.5th at p. 319, fn. 2.)

like a kitchen knife, is not inherently deadly. In *Brown*, the Court of Appeal held that by instructing with a former version of CALCRIM No. 875 the trial court erroneously permitted the jury to convict the defendant of assault with a deadly weapon on the basis that the BB gun he fired was "inherently dangerous," a legally incorrect theory.[4] (*Brown*, at pp. 6, 8-9.) The defendant in *Brown* argued that because the record did not demonstrate whether the jury relied on a legally correct theory, his conviction must be reversed. (*Id.* at p. 12.) However, the Court of Appeal rejected that argument and instead held that even in cases involving a legally inadequate theory the *Chapman*[5] harmless-beyond-a-reasonable-doubt standard of prejudice applied. (*Brown*, at pp. 12-13.) Based on the "ample evidence at trial [that] Brown used the BB gun in a manner capable of inflicting and likely to inflict great bodily injury" and the arguments of counsel emphasizing that theory, the Court of Appeal in *Brown* held that the instructional error was harmless. (*Id.* at p. 13.)

Recently, in *Stutelberg*, *supra*, 29 Cal.App.5th 314, this court considered these same issues.[6] There, the defendant jabbed a box cutter at two victims, lacerating one of them but not injuring the other. (*Id*. at pp. 315-316.) The jury convicted defendant of

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4 At the time, CALCRIM No. 875 provided that a deadly weapon is "any object, instrument, or weapon that is inherently deadly *or dangerous* or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (*Brown*, *supra*, 210 Cal.App.4th at p. 8, italics added.)

5 *Chapman v. California* (1967) 386 U.S. 18.

6 Because *Stutelberg*, *supra*, 29 Cal.App.5th 314 was decided after the parties filed their principal briefs, we requested and have reviewed the parties' supplemental briefs on *Stutelberg*.

assault with a deadly weapon as to the uninjured victim and mayhem as to the injured one. (*Id.* at p. 317.) As to both victims, the jury found true an enhancement for personal use of a deadly or dangerous weapon. (*Ibid*.) At trial, the court defined "deadly weapon" by giving CALCRIM Nos. 875 and 3145—the same instructions given here. (*Ibid*.)

On appeal, defendant asserted that because a box cutter is not an inherently deadly weapon, the inclusion of language in CALCRIM Nos. 875 and 3145 regarding an "inherently deadly weapon" was error. For the jury to properly find that defendant used a deadly weapon, it would have needed to rely on the theory that he *used* the box cutter in a way capable of causing and likely to cause death or great bodily injury. (*Stutelberg*, *supra*, 29 Cal.App.5th at p. 317.) Relying on *Aledamat*, *supra*, 20 Cal.App.5th 1149, defendant asserted (1) this type of error was legal as opposed to factual error; and (2) as such, reversal was required absent an affirmative showing that no juror relied on the invalid legal theory. (*Stutelberg*, at p. 320.)

In *Stutelberg*, *supra*, 29 Cal.App.5th 314 we agreed that the error was properly characterized as legal rather than factual error. However, disagreeing with *Aledamat*, *supra*, 20 Cal.App.5th 1149, and instead relying on *People v. Merritt* (2017) 2 Cal.5th 819 (*Merritt*), *In re Martinez* (2017) 3 Cal.5th 1216 (*Martinez*), and *Neder v. United States* (1999) 527 U.S. 1 (*Neder*), we held that the "time-tested" "'harmless beyond a reasonable doubt' framework is the proper standard to apply" in such a case. (*Stutelberg*, at p. 320.) We noted there was compelling evidence that the defendant stabbed at the victim's head, and thus used the weapon "'in such a way that it is capable of causing and likely to cause death or great bodily injury'" (*Stutelberg*, *supra*, 29 Cal.App.5th at p.

322)—a proper definition in CALCRIM Nos. 875 and 3145. We also noted that in closing argument, the prosecutor did not expressly refer to the "'inherently deadly weapon' theory'" nor otherwise invite the jury to classify the box cutter as inherently deadly. (*Ibid*.) Rather, the prosecutor discussed the defendant's use of the weapon to "'swipe" and 'slash open'" the victims in a manner likely to cause death or great bodily injury. (*Ibid*.) We concluded the error was harmless beyond a reasonable doubt as to the injured victim because "[h]ad the jury been provided only with the 'deadly or dangerous as used' theory and not the inapplicable 'inherently deadly weapon' theory, there is no reasonable probability it would have rejected the deadly weapon enhancement . . . ." (*Ibid*.)

Davis concedes that *Stutelberg* is "very similar" to his case. However, on several different grounds, he asserts that *Stutelberg* was wrongly decided.

First, Davis contends that *Stutelberg's* reliance on *Neder*, *supra*, 527 U.S. 1 and *Merritt*, *supra*, 2 Cal.5th 819 is "misplaced." Specifically, Davis notes that *Neder* and *Merritt* are "omitted elements" cases. In *Neder*, the trial court "erred in refusing to submit the issue of materiality to the jury with respect to those charges involving tax fraud." (*Neder*, at p. 4.) The United States Supreme Court held that *Chapman* applies to such error. (*Neder*, at p. 4.) Likewise in *Merritt*, a jury convicted the defendant of robbery; however, the court failed to instruct the jury on the elements of robbery. The California Supreme Court applied *Chapman* in determining if the error was prejudicial. (*Merritt*, at p. 831.)

Davis also stresses that in both *Neder*, *supra*, 527 U.S. 1 and in *Merritt*, *supra*, 2 Cal.5th 819, the omitted element was uncontested. In *Neder*, the government introduced evidence that the defendant failed to report over $5 million in income. (*Neder*, at p. 16.) That evidence of materiality was "so overwhelming" the defendant did not argue that his false statements of income could be found immaterial. (*Ibid.*) Similarly, in *Merritt* the defendant conceded that a robbery occurred. His defense was that he was not the robber. (*Merritt*, at p. 822.)

From these observations, Davis extrapolates that *Chapman* review is appropriate "*only* in those cases where the element removed is uncontested but not in cases where there is any dispute as to the evidentiary support for the omitted element." (Italics added.)

Davis's argument fails because it is a faulty generalization. The *Chapman* standard for assessing the prejudicial effect of error is not limited to uncontested omitted element cases. Pertinent here, the California Supreme Court in *Martinez*, *supra*, 3 Cal.5th 1216 applied *Chapman* in assessing the prejudicial effect of an erroneous jury instruction that permitted the jury to consider both a legally valid and invalid theory. The *Martinez* court held, "An instruction on an invalid theory may be found harmless when 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary' under a legally valid theory." (*Martinez*, at p. 1226.)

Moreover, Davis's argument erroneously conflates (1) the standard for determining whether error is prejudicial (i.e., *Chapman*), with (2) the evidence and litigation facts a court applies to that standard in determining whether reversal is required. To evaluate

prejudice under *Chapman,* a court reviews the entire record, including the evidence, instructions, counsels' arguments, any jury questions during deliberations, and the entire verdict. (*Merritt, supra*, 2 Cal.5th at pp. 831-832.) Thus, contrary to Davis's contention, whether a defendant contests or instead concedes the existence of a missing element does not affect *whether Chapman* applies, but rather *how* courts apply *Chapman* in an omitted element case.

In *Stutelberg*, we quoted from *Martinez*, *supra*, 3 Cal.5th at page 1226, stating: "The [California] Supreme Court likewise recently held that instructing on an invalid legal theory may be harmless when "'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made findings necessary'" to convict under a different, valid legal theory." (*Stutelberg*, *supra*, 29 Cal.App.5th at p. 320.) Davis contends this quotation "does not account adequately for the standard of prejudice which *Martinez* found applicable." Davis asserts that in *Martinez*, the California Supreme Court applied the standard as stated in *People v. Chiu* (2014) 59 Cal.4th 155, 167—which requires "a showing 'beyond a reasonable doubt that the jury based its verdict on the legally valid theory.'"

We fail to discern any meaningful difference between the two formulations. The phrase "other aspects of the verdict or the evidence" in *Stutelberg* is simply a more detailed statement of the terminology Davis prefers—"a showing." The phrase "other aspects . . . leave no reasonable doubt" is equivalent to "a showing 'beyond a reasonable doubt.'"

Last, Davis contends that as a matter of policy, *Aledamat*, *supra*, 20 Cal.App.5th 1149, which requires reversal absent an affirmative showing that no juror relied on the invalid legal theory, is the better rule. Davis asserts that when jurors have been given the option of relying on a legally inadequate theory, there is no basis for believing their experience or intelligence will preclude them from convicting on that invalid theory.

However, the California Supreme Court has recently considered and implicitly rejected this same argument. In *Martinez*, *supra*, 3 Cal.5th 1216, the court recognized that when """jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."""" (*Id*. at p. 1224.) Nevertheless, the court applied *Chapman*, stating that the presumption of error in such cases "can be rebutted by showing 'beyond a reasonable doubt that the jury based its verdict on the legally valid theory.'" (*Ibid*.; see also *People v. Jackson* (2018) 26 Cal.App.5th 371, 379 & fn. 8 [citing *Martinez* and holding, "We disagree with any suggestion that a finding of harmlessness requires affirmative proof of the jury's reliance on a legally valid theory."].)

Having determined that *Stutelberg*, *supra*, 29 Cal.App.5th 314 was correctly decided, that case compels the same result here. John, Jessica, and Jason testified that Davis charged after John aggressively, stabbing at him with the knife and getting within striking distance. Jason testified that Davis was using the knife "in a stabbing motion," thrusting the knife at John and saying "I'm going to get you," as Davis got within an arm's length of John. Thus, Davis was using the knife "in such a way that it is capable of causing and likely to cause death or great bodily injury." (CALCRIM Nos. 875, 3145.)

Davis disagrees, asserting that the People "cannot prove beyond a reasonable doubt that the court's error is harmless" because "the record is equivocal on the use of the knife." This argument, however, distorts the record. The victim and both independent witnesses unequivocally testified that Davis aggressively charged after John with the knife and came within striking distance. It is true, as Davis points out, that John testified Davis was three to five feet away, whereas Jessica placed Davis about a foot away, and Jason testified that Davis was an arm's length away. But these minor variances in estimating distances during the assault are insignificant. The critical point is that every witness (other than Davis) testified that Davis chased John with a large knife and got close enough to stab him.

The only contrary evidence was Davis's own testimony that John attacked him and in the melee the knife accidentally fell out of his backpack. But the jury was entitled to—and did—reject this story as completely lacking credibility, returning guilty verdicts after just 43 minutes of deliberations.

The prosecutor's closing argument also indicates that the error was harmless beyond a reasonable doubt. The prosecutor emphasized the manner in which Davis *used* the knife—at one point arguing that Davis "was chasing [John] with that knife, aggressively advancing on him with it out in front of him, moving it back and forth in front of him as if to stab [John]." Perhaps more importantly, referring the jury to the "definitions for a deadly weapon", the prosecutor alluded *only* to the *correct* definition, stating, "Now we're at definitions for a deadly weapon. In this case, it's not a huge issue

because of course the weapon was a very large knife obviously capable of inflicting significant or substantial physical injury . . . ."[7]

Had the jury been provided only with the "deadly or dangerous as used" theory and not the inapplicable "inherently deadly weapon" theory, there is no reasonable probability that it would have acquitted on count 1 or rejected the deadly weapon enhancement on both counts. Accordingly, the instructional error was harmless beyond a reasonable doubt. (*Stutelberg*, *supra*, 29 Cal.App.5th at p. 322.)

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.

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7 Davis concedes that the prosecutor's closing argument "alluded to the correct definition" of deadly weapon, but contends that counsel's arguments are "no substitute for instructions from the court." However, counsel was not purporting to substitute his view of the law for a jury instruction. Counsel directed the jury to evaluate the evidence in light of the correct and applicable law, rather than the incorrect and inapplicable inherently deadly theory.